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Nos. 82-814 and 82-878

In the Supreme Court of the United States

OCTOBER TERM, 1982

EUGENE BOFFA, SR., PETITIONER

v.

UNITED STATES OF AMERICA

LOUIS S. KALMAR, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) [1] is reported at 688 F.2d 919.

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[1] "Pet. App." refers to the appendix in No. 82-814.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1982. A petition for rehearing was denied on September 24, 1982. The petition for a writ of certiorari in No. 82-814 was filed as of November 1, 1982. The petition in No. 82-878 was filed on November 24, 1982, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. Following a jury trial in the United States District Court for the District of Delaware, petitioners were convicted of various racketeering and mail fraud offenses.[2] Petitioner Boffa was convicted of racketeering, in violation of 18 U.S.C. 1962(c) (Count 2); conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(d) (Count 1); and seven counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts 5-11). Petitioner Kalmar was convicted of racketeering and conspiracy to engage in racketeering (Counts 1 and 2) (C.A. App. 16-19).[3]

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[2] Five other defendants were named in the indictment. Robert Boffa, Sr., and Chandler Lemon were tried and convicted along with petitioners. Robert Rispo pleaded guilty and testified for the government at the trial; the case against him was ultimately dismissed. Francis Sheeran was tried separately and convicted.

[3] Petitioner Boffa was sentenced to concurrent terms of 20 years' imprisonment on counts one and two. He was sentenced to seven consecutive 34-month terms on counts five through eleven, with those sentences to run concurrently with the sentences on counts one and two. He was also fined a total of $47,000 (C.A. App. 16). Petitioner Kalmar was sentenced to concurrent terms of ten years' imprisonment on counts one

The court of appeals affirmed petitioners' racketeering convictions but reversed petitioner Boffa's mail fraud convictions (Counts 5-11).[4]

2. The indictment charged petitioners with engaging in a series of unlawful schemes in connection with a labor leasing operation.[5] The schemes included: (1) making payoffs to a union leader in exchange for assurances of labor peace and assistance in obtaining contracts (C.A. App. 51, 57, 58, 62-66); (2) defrauding employees at several plants of their contractual rights to wages and benefits (C.A. App. 54, 57, 70, 78); (3) defrauding employees of economic benefits stemming from rights guaranteed by the National Labor Relations Act, 29 U.S.C. 157 (C.A. App. 53-54, 57, 70, 78); (4) defrauding employees of their right to the loyal, faithful, and honest services of the president of their union (C.A. App. 53, 57, 78); and (5)

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and two and was fined a total of $20,000 (C.A. App. 18). Both petitioners were also ordered, pursuant to 18 U.S.C. 1963, to forfeit their interests in companies used in the racketeering enterprise (C.A. App. 20-22).

[4] The court vacated the forfeiture entered against petitioners, as well as petitioner Boffa's sentences, and remanded to the district court to determine what, if any, effect the reversal of the mail fraud convictions had on the district court's sentence and judgment of forfeiture (Pet. App. 39a-40a).

[5] A labor leasing company contracts with an independent business to provide labor for that business. The labor leasing company is then the employer of the workers provided to the business. The leasing company handles all aspects of the employment relationship, including the payment of wages and benefits, union relations, and the resolution of labor grievances. The labor leasing company is typically paid a fee in excess of the cost of wages and benefits paid by the leasing company to its employees.

obstructing justice by supplying altered documents to the grand jury (C.A. App. 51, 67).

3. Petitioners were the owners of Universal Coordinators, Inc. (UCI), a labor leasing company headquartered in Elmwood Park, New Jersey (F-213, H-95 to H-96, H-213 to H-214).[6] Petitioner Boffa also owned a number of closely related corporations (H-96 to H-97). Petitioners effected the fraudulent schemes principally by switching the labor leasing contracts at various plants from UCI to other companies whose employees worked for lower wages. Although petitioners and those who assisted them claimed that the latter companies were independent, in fact they were also controlled by petitioners. The switches resulted in the loss of wages and benefits by UCI's employees. Through payoffs to co-defendant Francis Sheeran, the president of Teamsters Local 326, which represented some of UCI's employees, petitioners obtained his cooperation and acquiesence in this scheme.

4. Petitioner Boffa made a number of cash payments to Sheeran in exchange for Sheeran's help in his business (F-219, F-222). Sheeran provided assistance in obtaining work for petitioner Boffa's company, and the two men then split the profits (J-108). In addition, petitioner's companies provided automobiles for Sheeran's use free of charge. The cars were supplied by All Purpose Leasing (APL), a corporation owned jointly by petitioners, and the monthly lease payments for the cars were made to APL by UCI. Petitioner Kalmar approved the payments made by UCI for the lease of a 1975 Lincoln Continental

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[6] The transcript is cited in this brief so as to conform to the system of pagination used by the court reporter. Thus, for example, "F-213" refers to volume F, page 213, of the trial transcript.

used by Sheeran (H-103 to H-104).[7] At the conclusion of the lease period, Boffa arranged for Sheeran to be given a bank loan of $5000 to purchase that car (H-145). The evidence at trial showed that the true value of the car was then substantially in excess of $5000 (H-147).[8]

During its investigation, the grand jury subpoenaed APL's records (Gov't Exh. 73; G-183 to G-185). The original copies of the subpoenaed records did not reflect the receipt of any funds from Sheeran for the lease of any cars (G-187 to G-189). After receiving the subpoena, however, Boffa directed several APL employees to alter the records by adding a notation indicating that the company had received monthly cash payments from Sheeran. The altered records were then given to the grand jury (G-188 to G-204, G-241, H-58 to H-61).[9]

5. During 1973, Crown Zellerbach's plant at Newark, Delaware, leased its truck drivers from UCI (A-114, A-116, A-170, B-4 to B-5, I-12 to I-13). The drivers employed by UCI at the Crown Zellerbach

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[7] The monthly payments that covered Sheeran's use of the 1975 Lincoln Continental for July, August, September, and October of 1975 provided the basis for racketeering acts 40-43 of the indictment, in which the jury found that petitioners violated 29 U.S.C. 186(a) by giving things of value to a union representative.

[8] The sale of the 1975 Lincoln Continental to Sheeran for substantially less than its true market value formed the basis for racketeering act 51, in which the jury found that petitioner Boffa had violated 29 U.S.C. 186(a) by giving a thing of value to a union representative.

[9] The alteration of the APL records formed the basis for racketeering act 53, in which the jury found that petitioner Boffa had engaged in obstruction of justice, in violation of 18 U.S.C. 1503.

plant were represented by Sheeran's union (A-117). In the fall of 1973, the truck drivers at Crown Zellerbach sought a wage increase (A-172). When a Crown Zellerbach representative told petitioner Boffa that the company would not be willing to increase the company's payments to UCI in order to provide for higher wages for the truck drivers, Boffa told the representative that he intended to terminate the labor leasing contract between the two companies (A-171 to A-172). Boffa then suggested that Crown Zellerbach use a new labor leasing company to "fill the void" (A-172 to A-173). The new company recommended by Boffa was Countrywide Personnel of California, which was represented by Robert DeWan. DeWan, who had previously worked for Boffa as the West Coast representative of UCI, testified at trial that Boffa had directed him to take over the Crown Zellerbach contract in the name of Countrywide Personnel of California (A-171 to A-172, B-130).

In January 1974, UCI announced that it was terminating its contract with Crown Zellerbach, and Crown Zellerbach agreed to enter into a contract with Countrywide Personnel (A-122 to A-125, A-173). Petitioner Boffa then arranged for DeWan to meet with Sheeran and the drivers, and the drivers were permitted to apply to DeWan for jobs with Countrywide Personnel. Sheeran was present at that meeting, and DeWan hired the drivers whom Sheeran recommended (B-38 to B-39, B-131, B-134 to B-136).[10]

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[10] Those drivers included some, but not all, of the drivers previously employed by UCI. The former UCI drivers hired by Countrywide Personnel lost certain benefits that they had accrued in the course of their employment with UCI, in addition to suffering a reduction in wages (B-88). Those not rehired, of course, lost their jobs as well (B-90).

At the time of the contract change, DeWan told the truck drivers and a Crown Zellerbach representative that there was "absolutely no connection whatsoever" between his firm and UCI (A-124; B-77). In fact, however, as DeWan acknowledged at trial, Boffa controlled Countrywide Personnel, and DeWan was simply his "figurehead" (F-225).[11]

After less than a year of operation, Countrywide Personnel of California was dissolved, and the Crown Zellerbach contract was transferred to Countrywide Personnel of Jersey City, which was owned by petitioners (A-122 to A-123, A-175 to A-176, B-8 to B-10, B-90 to B-92, H-202, H-220, I-20 to I-21). The assets of Countrywide Personnel of California were then transferred back to UCI (B-146, B-148).

6. During 1975, petitioners engineered a similar switch of labor contracts at an Ohio plant of the Continental Can Company. In 1975, UCI, which leased truck drivers to the plant, began having labor problems with the drivers. In July 1975, UCI terminated its contract with Continental Can. At about the same time, co-defendants Robert Rispo and David Mishler, who represented Countrywide Personnel of Chicago,

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[11] In addition, UCI advanced funds to Countrywide Personnel to meet the first payrolls on the Crown Zellerbach contract (B-137); Countrywide Personnel paid a "service fee" to UCI in connection with the Crown Zellerbach account that amounted to 75% of its total profits on that contract (B-161); and in running Countrywide Personnel, DeWan followed orders from petitioner Boffa (B-164). DeWan also testified that UCI prepared the payroll checks for Countrywide Personnel on its computer in New Jersey. The checks, however, were not issued directly to the employees at the Crown Zellerbach plant. Instead, the computer-generated payroll figures were copied over by hand onto Countrywide Personnel checks (B-140).

met with UCI's employees (E-74 to E-78, E-142 to E-146, F-231 to F-234). Countrywide Personnel of Chicago was owned principally by petitioners and co-defendant Robert Boffa (F-72, F-226). Rispo and Mishler, acting on petitioner Boffa's instruction, told the drivers that they had learned "through the grapevine" that UCI was terminating its contract with Continental Can and that the drivers would shortly be losing their jobs (E-73 to E-77, E-153, E-163 to E-164). Rispo and Mishler then offered to hire the drivers at lower wages than UCI had been paying (E-77, E-79). Rispo testified that the rate he was instructed to offer the drivers had in fact already been negotiated between Robert Boffa and a representative of the Teamsters Union (F-233 to F-234). Several days after that meeting, UCI sent termination notices to each of the drivers at the Continental Can plant (E-78). The drivers subsequently agreed to accept employment at lower wages with Countrywide Personnel of Chicago (E-81).

7. In 1977, petitioners arranged another switch of labor contracts. UCI provided the truck drivers who worked at Inland Container Corporation's plant in Newark, Delaware. When Inland Container began having labor difficulties with the drivers, co-defendant Chandler Lemon contacted the management at Inland Container and offered to provide drivers to the company after the termination of the UCI contract. Lemon stated that he represented Preferred Personnel of Miami, Florida, and that he would bring in drivers who were represented by the Brotherhood of Railway and Airline Clerks, rather than by the Teamsters, who had represented the drivers previously (C-25, C-32 to C-35, E-17). The new union, Lemon explained, would accept substantially lower wages and fringe benefits

(C-38). Inland Container accepted Lemon's offer, and immediately after the termination of the contract with UCI, Preferred Personnel began providing truck drivers for Inland Container (C-41).[12] The drivers who had been working at Inland Container lost their jobs, as well as various accrued benefits (C-79, C-104, C-119 to C-120, C-124 to C-125, C-130, C-134 to C-135, C-149).

Although Lemon was in fact working for petitioners and co-defendant Robert Boffa, he told the drivers that there was no connection between Preferred Personnel and UCI. Moreover, when the National Labor Relations Board conducted an investigation of the "switch" from UCI to Preferred Personnel, petitioner Boffa submitted an affidavit in which he falsely represented that he had no connection with Preferred Personnel.[13] In fact, however, the evidence showed that Preferred Personnel was closely connected with him and with UCI.[14]

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[12] The termination letters sent to seven UCI employees at Inland Container Corporation formed the basis for racketeering acts 6 through 12, in which the jury found that petitioner Boffa had committed mail fraud.

[13] The mailing of that affidavit formed the basis for racketeering act 14, in which the jury found that petitioner Boffa had committed mail fraud. Two other mailings in connection with the "switch" at Inland Container—letters to Inland Container representatives—formed the basis for racketeering acts 5 and 13, in which the jury found that petitioner Boffa had committed mail fraud.

[14] Chandler Lemon had worked for UCI, and Preferred Personnel was incorporated by Eugene Boffa, Jr., petitioner Boffa's son. Persons who dealt with Lemon were told that if he was not able to resolve problems, they should contact Robert Boffa, the ultimate decisionmaker in the company

ARGUMENT

1. Petitioner Boffa contends (82-814 Pet. 16-30) that the district court erred in failing to instruct the jury that the predicate acts of racketeering charged in the indictment must be related to each other. His argument lacks merits.

Under 18 U.S.C. 1962(c), it is necessary to prove that the defendant conducted or participated in the affairs of an enterprise through a "pattern of racketeering activity," which is defined by 18 U.S.C. 1961(5) as two or more acts of racketeering activity. As the courts of appeals have uniformly held, if these elements are proved, no other pattern, connection, or relationship among the acts of racketeering need be shown. See *United States* v. *Provenzano*, 688 F.2d 194, 200 (3d Cir. 1982); *United States* v. *Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 450 U.S. 912 (1981); *United States* v. *Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir.), cert. denied, 449 U.S. 871 (1980).

(E-56). In addition, Preferred Personnel paid a portion of its profits directly to UCI (E-215).

Moreover, Lemon, who represented Preferred Personnel, was also president of Countrywide Personnel of Miami, Inc., a company whose principal stockholder was petitioner Boffa (E-238, F-226). The evidence showed that Countrywide Personnel of Miami made payments on Boffa's behalf for a boat and an apartment that he kept in Florida (E-243 to E-246, F-32 to F-34). Finally, at about the time when Preferred Personnel was incorporated, petitioner Boffa explained to one of his employees that they had chosen the name "Preferred Personnel" because the names "Countrywide" and "Universal" were becoming too well known and because an investigation was being conducted of the Boffa labor leasing operation (F-228).

United States v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Elliott*, 571 F.2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978). In accordance with these decisions, the district court in the present case charged the jury that it had to find that there was "a connection between the pattern of racketeering activity and the operation or management of the business of the enterprise" (C.A. App. 292, 294). This instruction was correct, and the defendants did not object to it. As the court of appeals held (Pet. App. 35a), any error in the instruction did not rise to the level of plain error, especially since the defendants "[did] not assert that the predicate acts charged in the indictment were in fact unrelated" (*ibid.*).[15]

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[15] Even assuming arguendo that the predicate acts in this case were unrelated except in the sense discussed above and that petitioners had objected to the jury instruction, there is no conflict in the circuits on this issue, as petitioner maintains (82-814 Pet. 21-22). On the one hand, petitioner incorrectly states that in *United States* v. *Weisman*, *supra*, 624 F.2d at 1121-1124, and *United States* v. *Elliott*, *supra*, 571 F.2d at 899, the Second and Fifth Circuits held that predicate acts of racketeering need not be related. Instead, those two courts, like the district court in the present case, held that the predicate acts must be related in the sense that they must be acts through which the defendant conducts or participates in the enterprise's affairs. At the same time, petitioner also incorrectly states (82-814 Pet. 22) that the Fourth, Seventh, and Eighth Circuits have held that some additional relationship among the predicate acts must be established. In *United States* v. *Karas*, 624 F.2d 500, 503 (4th Cir. 1980), the court of appeals did not even discuss the question whether and in what way predicate acts of racketeering must be related. Instead, the court simply quoted a jury instruction that did not require proof of any connection other than that supplied by participation in the enterprise's affairs. *United States* v. *Starnes*, 644 F.2d 673,

2. Petitioner Boffa contends (82-814 Pet. 30-37) that he was deprived of his Sixth Amendment right to the effective assistance of counsel because his trial counsel had a conflict of interest. The court of appeals, however, properly rejected this claim because during a lengthy hearing in district court, Boffa expressly waived objection to any possible conflict of interest on the part of his trial counsel, who had previously represented a government witness and three other defendants in the case (11/3/80 Tr. 3-35).

It is well settled that a defendant may waive his right to conflict-free representation by knowingly and intelligently consenting to continued representation after being fully apprised of the dangers of the potential conflict of interest. *Wood* v. *Georgia*, 450 U.S. 261, 273-274 (1981); *United States* v. *Quinones*, 613 F.2d 47, 49 (3d Cir.), cert. denied, 446 U.S. 937 (1980); *United States* v. *Alvarez*, 580 F.2d 1251, 1259 (5th Cir. 1978). In this case, appellant Boffa made just such a waiver.[16]

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678 (7th Cir. 1981), contains dictum to the same effect. Finally, in *United States* v. *Dean*, 647 F.2d 779, 788 (8th Cir. 1981), the court did not consider whether the predicate acts of racketeering alleged in a single RICO count must be related but instead held that a defendant may be convicted of two separate violations of 18 U.S.C. 1962(c) where he conducts or participates in the affairs of a single enterprise through two distinct patterns of racketeering activity. Whatever the merits of the decision in *Dean*, it affords no basis for concluding that the Eighth Circuit would have decided the instant case differently from the decision reached by the Third Circuit. See *United States* v. *Anderson*, *supra*, 626 F.2d at 1367.

[16] This is not to say that the court must accept such a waiver. Instead, in our view, it may and often should refuse

At the pretrial hearing, the district court pointed out to the defendants and their attorneys that there was a potential conflict of interest arising from attorney James Schwartzman's representation of petitioner Boffa and his previous representation of the other defendants, as well as several employees of Boffa's who were likely to be called as government witnesses. Schwartzman advised the court in writing that he had fully discussed the conflict issue with petitioner Boffa, that Boffa understood the matter, and that Boffa had no objection to Schwartzman's continued representation (C.A. App. 1007-1010, 1025-1026). Counsel explained that his representation of the other defendants had involved matters relating only to the investigative phase of the case and that he had ceased representing them when the government had advised him that they would be indicted (C.A. App. 1017-1020). He further advised the court that he could adequately cross-examine his former clients without violating any confidences and without prejudicing petitioner Boffa (C.A. App. 1025-1026).

The district court then questioned petitioner Boffa under oath. Boffa testified that Schwartzman had fully explained the conflict issue to him, and Boffa stated that he understood the risks involved (C.A. App. 1026-1028). The court reiterated the specific

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to allow representation by counsel with actual or potential conflicts of interest. Whether defendants being jointly tried have a right to insist on joint representation by a single attorney or law firm despite potential conflicts of interest is the issue presented in *Flanagan* v. *United States*, cert. granted, No. 82-374 (Jan. 10, 1983). But where a court accepts a defendant's knowing waiver, the defendant may thereafter properly be foreclosed from challenging his conviction on conflict of interest grounds.

dangers that might flow from the potential conflict in the course of trial. Petitioner repeatedly stated that he understood those dangers but that he preferred to proceed with Schwartzman as his attorney (C.A. App. 1028-1029). At the conclusion of this hearing, the district court found that Boffa understood the potential hazards posed by Schwartzman's prior representation and that Boffa had validly waived his right to conflict-free representation (C.A. App. 1038).

The waiver hearing in this case was extraordinarily thorough. In light of the extensive and probing nature of the court's inquiry, there is simply no basis upon which to challenge the court's finding that petitioner understood the risks involved in continuing with Schwartzman as his counsel and that he chose to do so in spite of those risks. Plainly, the court's finding cannot be characterized as clearly erroneous. See, *e.g.*, *United States* v. *Quinones*, *supra*, 613 F.2d at 49. In any event, petitioner Boffa has totally failed to meet his burden of showing that the threatened conflict of interest adversely affected Schwartzman's performance at trial. See *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). Schwartzman represented only petitioner Boffa at trial, and Boffa has not suggested any respect in which Schwartzman's representation was adversely affected by his pre-indictment representation of other figures in the case.

3. Petitioner Boffa also contends (82-814 Pet. 38-45) that the district court improperly refused to instruct the jury concerning his "theory of the defense," *i.e.*, that the jury should have acquitted if it believed that his conduct "was lawful and necessitated by the economic pressures of the marketplace" (82-814 Pet. 39). Such an instruction, however, would have misstated the law, since it is clear that "economic pres-

sure" is not a defense to criminal charges. See, *e.g.*, *United States* v. *Palmer*, 458 F.2d 663, 665 (9th Cir. 1972). The valid legal defense most closely related to the one upon which petitioner Boffa relies are the common law defenses of duress and necessity, but the evidence at trial failed to raise a jury question with respect to the basic requirements of either of those defenses. The district court therefore properly declined to instruct the jury on petitioner's so-called "theory of the defense." [17]

4. Petitioner Kalmar claims (82-878 Pet. 13-15) that the violations of 29 U.S.C. 186(a) that were charged as predicate acts of racketeering in the RICO counts constituted lesser included offenses and that the court should therefore have given a lesser included offense charge with respect to those violations. This contention is without merit.

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[17] The defense of duress requires proof of an imminent threat of serious bodily injury from which the defendant has no means of escape. *United States* v. *Bailey*, 444 U.S. 394, 410-415 (1980); *United States* v. *Agard*, 605 F.2d 665, 667-668 (2d Cir. 1979); *United States* v. *Saettele*, 585 F.2d 307, 309 (8th Cir. 1978), cert. denied, 440 U.S. 910 (1979). The defense of necessity requires proof that the defendant was forced to do something that violated the criminal law in order to avoid a greater harm to society. *United States* v. *Richardson*, 588 F.2d 1235, 1239 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979). If the defendant fails to adduce evidence on each element of a proposed defense, the court is justified in refusing to instruct on that defense theory. *United States* v. *Atencio*, 586 F.2d 744, 746-747 (9th Cir. 1978). In this case, there was no evidence whatsoever that the defendants were forced to engage in labor racketeering in order to avoid some greater evil to society or in order to escape some threat of serious bodily injury.

Every court of appeals that has addressed the question has held that Congress intended predicate offenses in a RICO count to constitute separate offenses that may be separately charged and cumulatively punished. *United States* v. *Scotto, supra*, 641 F.2d at 56 (Section 186 offenses as racketeering acts); *United States* v. *Boylan*, 620 F.2d 359 (2d Cir.), cert. denied, 449 U.S. 833 (1980) (same); *United States* v. *Dean*, 647 F.2d 779, 785 n.14 (8th Cir. 1981); *United States* v. *Grande*, 620 F.2d 1026, 1030 (4th Cir. 1980); *United States* v. *Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). Thus, the predicate offenses do not merge with the RICO charge, and they therefore do not constitute lesser included offenses.[18]

5. Petitioner Kalmar maintains (82-878 Pet. 8-13) that the court of appeals affirmed his racketeering conviction on a basis not presented to the jury.

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[18] Relying on *Jeffers* v. *United States*, 432 U.S. 137 (1977), and *Whalen* v. *United States*, 445 U.S. 684 (1980), petitioner argues (82-878 Pet. 14-15) that where a charged offense necessarily includes some of the elements of a lesser crime, Congress' intent to punish the two crimes separately does not dispose of the question whether the defendant was entitled to a lesser included offense instruction. However, in *Jeffers* and *Whalen* this Court held merely that Congress did not intend to authorize cumulative punishments for the particular offenses at issue, and thus the Court had no occasion to consider whether Congress could have constitutionally done so. However, in *Missouri* v. *Hunter*, No. 81-1214 (Jan. 19, 1983), the Court held that due process does not bar the imposition of cumulative sentences for an offense and a lesser included offense. Furthermore, in the present case, no issue of cumulative punishments is presented because the violations of 29 U.S.C. 186(a) alleged as acts of racketeering were not charged as separate offenses.

This argument relates to petitioner's contention that he did not commit two acts of racketeering activity as required by 18 U.S.C. 1962(c). We submit, however, that Kalmar was properly found to have committed multiple acts of racketeering.

The racketeering acts committed by petitioner were violations of 29 U.S.C. 186(a), which makes it "unlawful for any employer or association of employers * * * [to] deliver * * * any money or other things of value to any officer or employee of a labor organization * * * with intent to influence him in respect to any of his actions, decisions, or duties * * *." The indictment alleged that petitioner committed seven such violations by causing UCI on seven separate occasions to deliver to Sheeran one month's free use of an automobile (see Pet. App. 27a-28a). The jury found that Kalmar had violated 18 U.S.C. 1962(c) and by special verdict found that he had committed four separate violations of 29 U.S.C. 186(a).

The evidence showed that petitioners Boffa and Kalmar each owned 50% of the stock of UCI and a separate corporation called All Purpose Leasing (APL). The automobile was purchased with UCI funds, but APL held title. On the corporate books, UCI was shown to have loaned the funds to APL. According to a lease security agreement, UCI then leased the car from APL. UCI gave APL monthly checks, and Sheeran was given the free use of the car. While some APL records indicated that Sheeran had leased the car, the evidence showed that petitioner Boffa had caused the falsification of APL records, and the testimony of APL employees showed that Sheeran had never been billed for the use of the car (Pet. App. 29a-30a).

On appeal, petitioners raised several issues centered upon their contention that at most only one violation

of 29 U.S.C. 186(a) had taken place. Petitioners contended (see Pet. App. 32a-33a) that the jury instructions on the issue of single versus multiple violations of 29 U.S.C. 186(a) were deficient. The district court instructed the jury (see Pet. App. 32a; C.A. App. 317):

> If you find beyond a reasonable doubt that UCI made monthly payments to APL in discharge of Sheeran's monthly rental obligation for the use of the automobile, you may find that each payment constituted a separate delivery of a thing of value.

The court of appeals concluded that this charge was correct and sufficient (Pet. App. 32a-33a). Stating that each separate delivery of a thing of value constitutes a separate violation of 29 U.S.C. 186(a) (Pet. App. 28a-29a), the court held (*id.* at 32a) that the trial judge's instruction "adequately informed the jury that to find that [petitioners] had violated 29 U.S.C. § 186(a) more than once it must conclude beyond a reasonable doubt that each delivery constituted a thing of value." The court also rejected (Pet. App. 32a n.7) petitioner Kalmar's argument that the instruction "required the jury to conclude that Sheeran had an actual lease obligation to APL." Instead, the court interpreted the instruction to mean only that "the jury must find that UCI paid APL on a monthly basis for each month that Sheeran used the car" (*ibid.*).

Petitioners also argued below (see Pet. App. 31a-32a) that the evidence showed that they in fact committed only one violation of Section 186(a). Because of "the substantial identity of APL and UCI," petitioners maintained (Pet. App. 31a), UCI's monthly payments to APL "were merely a sham, in the nature of intracorporate transfers, that served

only to cover up the true nature of the transaction: a gift from UCI to Sheeran of four months' free use of the automobile." The court of appeals rejected (Pet. App. 31a-32a) this argument as well and stated that the jury could reasonably have concluded that each monthly lease payment represented the delivery of a separate thing of value. The court then explained (Pet. App. 31a) why it believed that such a conclusion was rational:

> First, UCI and APL were in fact separate corporate entities, incorporated twelve years apart, and engaged in different businesses. Second, UCI was actually billed each month by APL for the use of the car. Third, it is undisputed that UCI paid APL each month for the use of the car. Finally, these payments were recorded on the books of APL as genuine accounts receivable. From this, the jury could have concluded that UCI was treated by APL in the same manner as any other lessor would have been, and that had UCI stopped monthly payments on the car, Sheeran's use of the car would have been terminated.

Petitioner Kalmar now maintains that the court of appeals affirmed his conviction on a basis not presented to the jury. He states (Pet. 13) that "[t]he case was tried on [the] theory that UCI discharged Sheeran's debt" but that "the case was affirmed on the theory that UCI acquired its own interest in the car through the payments." In our view, any difference between these theories is purely semantic. As previously noted, the court of appeals concluded that the reference in the jury instruction to the "discharge of Sheeran's monthly rental obligation" was not meant in a purely literal sense. Thus, the jury

was not asked to determine whether petitioners caused the discharge of any formal debt by Sheeran but only whether UCI made monthly payments that resulted in monthly benefits for Sheeran (see Pet. App. 32 n.7). Once this is recognized, any meaningful distinction between the two theories evaporates.

In our view, petitioner Kalmar was correctly found to have committed multiple violations of 29 U.S.C. 186(a). First, as the courts of appeals have uniformly held, multiple payments made pursuant to a single agreement constitute multiple offenses under 29 U.S.C. 186(a). See *United States* v. *Colacurcio*, 659 F.2d 684, 688 n.4 (5th Cir. 1981); *United States* v. *Anderson*, 509 F.2d 312, 333 & n.151 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); *United States* v. *Keegan*, 331 F.2d 257, 260-261 (7th Cir.), cert. denied, 379 U.S. 828 (1964); *United States* v. *Tolub*, 309 F.2d 286, 289 (2d Cir. 1962); *Patton* v. *United States*, 42 F.2d 68, 69 (8th Cir. 1930) ("each payment for two weeks' protection was a separate and distinct offense"). Second, 29 U.S.C. 186(a) proscribes indirect, as well as direct, payments to union officials. See *United States* v. *Lanni*, 466 F.2d 1102, 1106-1109 (3d Cir. 1972); *United States* v. *McMaster*, 343 F.2d 176, 177, 181 (6th Cir. 1965); *Korholz* v. *United States*, 269 F.2d 897, 901-902 (10th Cir. 1959), cert. denied, 361 U.S. 929 (1960); *Brennan* v. *United States*, 240 F.2d 253 (8th Cir.), cert. denied, 353 U.S. 931 (1957).

In the present case, the evidence clearly showed that petitioner Kalmar caused four indirect payments to be made to Sheeran. He caused UCI to make monthly payments to APL, a separate corporation, and APL provided the use of the car to Sheeran (see Pet. App. 29a-30a). No other facts had to be proved

to establish multiple violations of 29 U.S.C. 186(a). Thus, the district court correctly instructed the jury that it could find multiple violations if it concluded that UCI made monthly payments to APL for Sheeran's use of the car (see Pet. App. 32a).[19]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1983

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[19] We disagree with the court of appeals' suggestion (see Pet. App. 31a-32a) that multiple violations could not have been properly found if APL's lease of the car to UCI was a "sham" in the sense that APL would not have terminated Sheeran's use of the car if payments had not been made. In our view, petitioners must accept the disadvantages, as well as the advantages, of the legal forms in which they chose to cast their transactions. Thus, we think the court of appeals' approach was unduly generous to petitioner. Because petitioner could not have been prejudiced by the difference between our approach and the approach of the court of appeals, it is unnecessary for this Court to grant review in this case to resolve this highly fact-bound issue.

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